89-1035

Docket No.

IN THE

Supreme Court of the United States

October Term, 1989

CSX TRANSPORTATION, INC.,

Petitioner,

v.

WILLIAM L. CALDWELL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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103 pp

QUESTION PRESENTED

Whether a state statute that permits application of the doctrine of forum non conveniens when the more convenient forum is located within the state, but absolutely prohibits application of the doctrine when the more convenient forum is located outside the state, violates either the Due Process or Equal Protection Clause of the Fourteenth Amendment.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

SEABOARD SYSTEM RAILROAD, INC.,

Petitioner,

v.

WILLIAM L. CALDWELL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petitioner, Seaboard System Railroad, Inc.,[1/] respectfully prays that a writ of certiorari be issued to review and reverse the opinion and judgment of the Supreme Court of Virginia.

OPINIONS BELOW

The opinion of the Virginia Supreme Court, Caldwell v. Seaboard System

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1/ Pursuant to Rule 28.1, petitioner's corporate affiliates are listed in the Appendix at 66A.

Railroad, Inc., (App. 22A-53A), is reported at 238 Va. 148, 380 S.E.2d 910 (1989). The trial court's order overruling Petitioner's Objection to Venue and Motion to Dismiss, entered April 8, 1986, is not reported. (App.11A). The trial court's February 9, 1987, final judgment appears in the Appendix at 16A.

JURISDICTION

The Virginia Supreme Court's opinion sustaining the validity of Virginia Code §8.01-265 was entered on June 9, 1989. Petitioner's requested rehearing was denied on September 22, 1989. (App.54A). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves an action under the Federal Employer's Liability Act (FELA) 45 U.S.C. §51 et seq. It also

involves the following Constitutional and statutory provisions:

Fourteenth Amendment of the United States Constitution

Virginia Code §8.01-257 (reprinted at App. 1)

Virginia Code §8.01-265 (reprinted at App. 2)

STATEMENT OF THE CASE AND RAISING THE FEDERAL QUESTION

Portsmouth, Virginia, has become a "happy hunting ground" for railroad employees suing under FELA, claiming job-related injuries occurring all over the continental United States. (App. 45A). Two-thirds (over 450) of the FELA cases filed in Portsmouth involved non-Virginians with out-of-state claims.[2/]

> The cases are numerous and constitute a substantial part

2/ From 1981 through November, 1989, 488 of the 731 FELA cases filed in Portsmouth involved non-Virginia plaintiff's whose incidents occurred outside Virginia. (App. 57A).

> of the judicial workload. The amounts in controversy are large, generating frequent appeals.

(App. 46A).[3/]

Seaboard, now CSX Transportation, a Virginia corporation, is the largest rail system east of the Mississippi River. Norfolk and Western Railway and Southern Railway, both Virginia corporations, together form the second largest railroad east of the Mississippi River. FELA plaintiffs from all over the East may sue these railroads in Virginia, regardless of the accident location, without fear of application of the doctrine of forum non conveniens.

3/ Justice Russell, dissenting, was joined by two others. The dissent noted: "One may only speculate as to the reasons for this phenomenon." 238 Va. at 158, 380 S.E.2d at 915-16. The answer is blatant and abusive forum-shopping. See Lowe v. Norfolk and Western R. Co., 124 Ill.App.3d 80, 463 N.E.2d 792 (Ill. App. Ct. 1984).

Respondent, William L. Caldwell, a Seaboard railroad employee and a North Carolina resident, came to Portsmouth's "happy hunting ground" seeking two million dollars under FELA for an injury that occurred in Charlotte, North Carolina. All material witnesses (except one independent physician) resided in or around Charlotte. Only two expert witnesses, selected by plaintiff shortly before trial, live in Virginia (Richmond, not Portsmouth). Seaboard's rail activities in Portsmouth had no relation to the incident.

Because Virginia has adopted the doctrine of forum non conveniens, Va. Code §8.01-257, Seaboard objected to venue early in the case and moved to dismiss based upon the doctrine of forum non conveniens. (App. 4A). Fortunately for Caldwell, as well as hundreds of other non-Virginian FELA plaintiffs,

Virginia prohibits the dismissal of a suit (conditional or otherwise) on the basis of forum non conveniens if the more convenient forum lies outside Virginia. Va. Code §8.01-265.[4/]

Seaboard argued that the non-dismissal provision of §8.01-265 of the Code of Virginia violated the United States Constitution. Therefore, Seaboard contended, because the provision was invalid, the court was free to apply the doctrine of forum non conveniens and

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4/ Forty-three states have adopted the doctrine by judicial decision or statute. Only two states, Montana and West Virginia, by judicial decision, have refused to apply the doctrine of forum non conveniens to FELA cases. Haug v. Burlington N. R.R. Co., 770 P.2d 517 (Mont. 1989); Gardner v. Norfolk and W. Ry. Co., 372 S.E.2d 786 (W.Va. 1988). Virginia, having embraced the forum non conveniens doctrine, Va. Code §8.01-257, then completely emasculates it with the non-dismissal provision of §8.01-265. Virginia is the only state embracing the doctrine that has such a limitation. Moreover, Montana, in rejecting forum non conveniens in FELA cases, left the issue open for reconsideration if FELA forum-shopping became rampant. Haug, supra, 770 P.2d at 521.

dismiss the case under terms fair to both parties.[5/] The trial court held that the non-dismissal provision was constitutional and the doctrine of forum non conveniens could not be applied, even if desirable.[6/]

Following a trial, jury verdict, remittitur,[7/] and final judgment, Seaboard appealed to the Virginia Supreme Court, claiming, as to venue, that the "non-dismissal" provision of was unconstitutional and the trial court should have granted Seaboard's motion, without prejudice, based upon forum non conveniens.

5/ The court could conditionally dismiss or stay the case and put defendant on terms not to plead certain defenses, like the statute of limitations.

6/ The trial judge indicated such desirability. (App. 10A).

7/ The trial court's remittitur of $500,000.00 from the $1.5 million verdict (which Petitioner had challenged as excessive) was affirmed by the Virginia Supreme Court.

The Virginia Supreme Court, in a four-to-three decision, rejected the constitutional claims (including Virginia constitutional claims). With respect to Equal Protection and Due Process, the court determined that the statute could be sustained if supported by a rational basis. Applying this standard, the court found two rationales for distinguishing between in-state and out-of-state application of the doctrine of forum non conveniens.

The court first noted a significant distinction between a transfer and dismissal, the latter raising the risk of a subsequent statute-of-limitations defense. The court declined to minimize the risks judicially. Second, the court justified the non-dismissal provision on the ground that it furthered Virginia's policy of maximum court access evinced by the long-arm statute. To use forum

non conveniens to deny access to Virginia courts would frustrate that policy.

The three dissenters criticized the majority as departing from the salutary rule that "the parties to a lawsuit are entitled to a level playing field." (App. 48A). They found no rational basis for the non-dismissal provision. Illustrating the effect of the court's decision, the dissent discussed the anomaly of a case arising in Bristol, Virginia, or Bristol, Tennessee, neighboring cities located at the extreme southwest end of Virginia. If the FELA plaintiff seeks recovery in Portsmouth, and the incident occurred in Bristol, Virginia, Seaboard could, for good cause shown, have the case transferred to Bristol. If the accident occurs a mile down the line in Bristol, Tennessee, the railroad would be required to defend

itself in Portsmouth. This situation, the dissent stated, leads to results "as absurd as they are unfair." (App. 48A).

They then criticized the two rational bases offered by the majority. First, they noted that forum non conveniens assumed the availability of a second forum and the court's power to stay proceedings or condition dismissal until the availability of the more convenient forum could be tested. Second, they stated that forum non conveniens and long-arm jurisdiction needed to be harmonized and that long-arm jurisdiction was not relevant since Seaboard was a Virginia corporation. The dissent would have declared the statute unconstitutional as violating the Equal Protection Clause.

REASONS FOR GRANTING THE WRIT

> I do not think the United States would come to an end if

> we [the Court] lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states.
>
> Justice Oliver Wendell Holmes[8/]

Virginia is corporate home to the three largest railroads in the East, CSX Transportation, (formerly Seaboard and others), Norfolk and Western Railway and Southern Railway (the latter two are wholly-owned subsidiaries of Norfolk Southern Corporation, also a Virginia corporation). Their lines stretch from the East Coast to the Mississippi River (and past) and from Canada to Florida and the Gulf Coast. The non-dismissal provision allows injured employees from these railroads, regardless of their own residence and where the accident

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8/ Quoted in R. Schnayerson, The Illustrated History of The Supreme Court of the United States, 63 (1986).

occurred, to come to Portsmouth's "happy hunting ground" and force the railroad to defend itself without regard to the cost and inconvenience of bringing records and witnesses from distant locations.

In Virginia, the doctrine of forum non conveniens has been adopted by statute. Va. Code §8.01-257 (1984).[9/] The doctrine is also an integral part of Federal law. Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947); 28 U.S.C. §1404(a). The fact that this is an FELA case does not alter the applicability of the doctrine of forum non conveniens. Missouri ex rel. Southern Ry. Co. v. Mayfield, 340 U.S. 1 (1950). Here, Virginia has statutorily recognized the policy of

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9/ Section 8.01-257 states in pertinent part: "[E]very action shall be commenced and tried in a forum convenient to the parties and witnesses, where justice can be administered without prejudice or delay." Va. Code §8.01-257 (1984).

applying the doctrine. Va. Code §8.01-257. However, the non-dismissal provision takes away a large part of what the General Assembly granted in §8.01-257. Because of §8.01-265, the fact that this FELA case was filed in state court and involves an accident occurring outside the state, the doctrine of forum non conveniens is unavailable. Paradoxically, this means that Virginia refuses to apply the doctrine in those cases where plaintiff's forum choice is most inconvenient. This legislative distinction is wholly irrational.

DENIAL OF EQUAL PROTECTION AND DUE PROCESS

Fourteenth Amendment Due Process and Equal Protection require that the classification in §8.01-265, distinguishing between in-state transfers and out-of-state dismissals, must be rationally related to a legitimate state

interest. Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985). Section 8.01-265 of the Virginia Code violates the Equal Protection and Due Process clauses of the Fourteenth Amendment by making an arbitrary, unreasonable, and irrational classification which permits one group of individuals the right to invoke the doctrine of forum non conveniens while denying this same right to another group of similarly situated individuals.

The non-dismissal provision of §8.01-265 wholly fails to meet the rational basis test for Equal Protection and Due Process. Rather, it is totally irrational, as evidenced by the example using the neighboring cities of Bristol, Virginia, and Bristol, Tennessee. The statute perversely refuses to acknowledge and apply the doctrine of forum non conveniens when it is most warranted --

when the convenient forum is in another state.

The Virginia Supreme Court advances two rational bases for the non-dismissal provision of §8.01-265. The court first cited the risk of an adverse statute-of-limitations ruling in the alternate jurisdiction as a reason justifying the distinction between an in-state transfer and a dismissal. Second, the majority justified the non-dismissal provision as extending Virginia's long-arm jurisdiction statutes to their due process limits.

A. THE RISKS ASSUMED IN DISTINGUISHING BETWEEN IN-STATE TRANSFERS AND DISMISSALS ARE ILLUSORY.

The Virginia Supreme Court first notes that if dismissal is permitted, a plaintiff may run afoul of the statute of limitations. This concern is wholly irrational.

The application of the doctrine of forum non conveniens always assumes the availability of an alternate forum. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 506-07 (1947). Courts applying the doctrine have uniformly protected plaintiffs against the "risks" posited by the Virginia Supreme Court. Burnett v. New York Central R.R. Co., 380 U.S. 424, 430 (1965); Lowe v. Norfolk and Western Ry. Co., 124 Ill.App.3d 80, 463 N.E.2d 792, 800-01 (App.Ct.), petition for leave to appeal denied, 467 N.E.2d 582 (Sup.Ct. Ill. 1984). For instance, in Lowe, the Illinois court conditioned its dismissal on Norfolk and Western agreeing to accept service of process from the more convenient court and to waive any possible statute-of-limitations defense. Similarly, the court has the inherent power to stay its proceedings until the plaintiff is properly before the more

convenient court. In light of the availability of these devices, the Virginia Supreme Court's stated concerns are irrational.

This Court's holding in Burnett v. New York Central R.R. Co., 380 U.S. 424 (1965), supports the protection afforded plaintiffs. In Burnett, the Court held that if an FELA plaintiff files a case in an improper venue and obtains jurisdiction over the defendant, but the court dismisses the case because of the improper venue, then the FELA statute of limitations is tolled for a limited time. Given the broad remedial policy underlying FELA, the Court reasoned that where the plaintiff did everything necessary to put the parties at issue, except in the wrong forum, then the limitation period is tolled.

By analogy, if that same plaintiff did all that was necessary to put the

parties at issue in a proper but inconvenient forum, under the Burnett rationale, the plaintiff would be entitled to the same (if not more) protection from the statute of limitations. Thus, even if a dilatory plaintiff commenced the FELA suit in an inconvenient forum on the day before the running of the statute of limitations, the time during which the suit was pending, as well as any time during which an appeal could be taken or an appeal was pending, tolls the statute of limitations. Burnett, 380 U.S. at 434-35. In addition, the Virginia Supreme Court overlooks the availability of state tolling and savings statutes in non-FELA cases. Id. at 431-33. Thus, the risk of dismissal to a plaintiff posited by the Virginia Supreme Court is non-existent, and the court's first concern has no rational basis.

B. THE NON-DISMISSAL PROVISION CONTRIBUTES NOTHING TO EXTEND MAXIMUM ACCESS TO VIRGINIA COURTS UNDER THE LONG-ARM STATUTES

The Virginia Supreme Court also justifies the non-dismissal provision of §8.01-265 as further effectuating Virginia's policy of granting broad access to its courts through the long-arm jurisdiction statutes, Va. Code §8.01-328.1, et seq. In essence, the court holds that once the trial court acquires personal jurisdiction over a non-resident defendant possessing the due process-required "minimal contacts" with Virginia, the non-dismissal provision insures that jurisdiction is retained within the Commonwealth.

Virginia's long-arm statute and the United States Constitution give the Commonwealth's courts the power to exercise personal jurisdiction over non-residents under certain circumstances.

The purpose of the long-arm statute is to protect and give Virginia residents the ability to sue and obtain jurisdiction over non-resident persons (including corporations) for wrongful acts affecting those Virginia residents within the Commonwealth. Carmichael v. Snyder, 209 Va. 451, 455-56, 164 S.E.2d 703, 707 (1968). Significantly, all of the long-arm jurisdiction circumstances require some connection with the Commonwealth of Virginia. See Va. Code §8.01-328.1, A, sub-paragraphs 1-5 (Cum.Supp. 1987).[10/] The court's power to exercise personal jurisdiction, and not the location of the trial, lies at the heart of Virginia's long-arm statutes. The court's logic renders the non-dismissal provision of §8.01-265 superfluous, not supplementary, since

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10/ Sub-paragraphs 6 through 9 of the long-arm statute are particularly local.

long-arm personal jurisdiction requires relation to the Commonwealth of Virginia, thereby establishing some convenience of forum without the necessity of the non-dismissal provision.

In the factual context of this case, neither the plaintiff nor his cause of action have any relationship whatsoever to the Commonwealth of Virginia. It is only by FELA's jurisdiction statute, 45 U.S.C. §56, that plaintiff acquired jurisdiction over Seaboard in Portsmouth, not by virtue of Virginia's long-arm statutes. Furthermore, plaintiff would never even have to resort to the long-arm jurisdiction statute where the defendant, like Seaboard, is a Virginia corporation.[11/]

[11/]The two other major eastern railroads, Norfolk and Western Railway and Southern Railway, are also Virginia corporations.

The absence of the non-dismissal provision would in no way limit or deny the access to Virginia courts provided by the long-arm statutes; plaintiffs would not be limited in acquiring personal jurisdiction over non-resident defendants. Rather, it would only limit, at the court's discretion, non-residents (non-taxpayers) from importing their foreign causes of action at the expense of Virginia citizens. Indeed, the non-dismissal provision of §8.01-265 adds nothing to the scope of personal jurisdiction created by Virginia's long-arm statutes.

Admittedly, the legislature has power to make venue provisions, so long as these provisions do not, by arbitrary and unreasonable discrimination, violate the fundamental guarantees of the Equal Protection Clause. But to comply with Due Process and Equal Protection, the

classification must be based on real and substantial differences having a reasonable relation to the subject of the particular legislation. Power Mfg. Co. v. Saunders, 274 U.S. 490 (1927).

The distinction in the Virginia statute is simply whether the more convenient forum is in this state [the doctrine of forum non conveniens is to be applied] or in another state [the doctrine cannot be applied]; such a distinction has no relationship to any state purpose, to principles of fair play or to the purpose of Virginia's own venue provisions. The distinction results in the arbitrary retention of those cases which would leave the Commonwealth if the doctrine of forum non conveniens was fairly and properly applied.

The realistic application of the non-dismissal provision, American

Motorists Ins. Co. v. Starnes, 425 U.S. 637 (1976), places Seaboard at an appreciable disadvantage: lack of compulsory process to obtain the Charlotte treating physician's presence; the expense of bringing Charlotte witnesses to Portsmouth for trial. The reality of the non-dismissal provision is discriminatory to FELA defendant railroads in not being able to assert the doctrine of forum non conveniens. As the classification is wholly unrelated to any legislative object, it violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment and the statute must be struck down. Reed v. Reed, 404 U.S. 71 (1971).

CONCLUSION

The petition for a writ of certiorari should be granted, and the decision below should be reversed as to the constitutionality of the non-dismissal

provision, and remanded with direction to determine the applicability of the doctrine of forum non conveniens in this case.

Respectfully Submitted,

SEABOARD SYSTEM
RAILROAD, INC.

BY: Samuel J. Webster
Of Counsel

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Counsel for Petitioner
December 21, 1989

CERTIFICATE OF SERVICE

In accordance with Rule 28.2 and 28.3, I hereby certify that I have served three (3) copies of this Petition for Writ of Certiorari upon the Respondent, William L. Caldwell, at the office of his counsel of record, Eddie W. Wilson, WILSON & ASSOCIATES, P.C ., 2200 Colonial Avenue, Suite 12-B, Post Office Box 11168, Norfolk, Virginia 23517, and Professor George Rutherglen, Professor of Law, University of Virginia School of Law, Charlottesville, Virginia 22901, pursuant to the requirements of Rules 28 and 33 of the Rules of the Supreme Court of the United States, by depositing same in a United States mail box, with first class postage prepaid, addressed to Respondents as set forth above, on or before December 21, 1989.

I further certify that I am a member of this Court, and that all parties

required to be served have been served on or before December 21, 1989.

RULE 28.4(c) STATEMENT

Because the constitutionality of Virginia Code §8.01-265 is drawn into question in the Petition for a Writ of Certiorari, 28 U.S.C. §2403(b) may be applicable, and a copy of this Petition has been served on the Attorney General of Virginia, the Honorable Mary Sue Terry.

Samuel H. Webster
Counsel for
Seaboard System
Railroad, Inc.

COMMONWEALTH OF VIRGINIA, AT LARGE, to-wit:

Subscribed and sworn to before me this 20th day of December, 1989.

Belinda S. Hood
Notary Public

My Commission Expires:
March 12, 1993

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

SEABOARD SYSTEM RAILROAD, INC.,

Petitioner,

V.

WILLIAM L. CALDWELL,

Respondent.

APPENDIX TO PETITION FOR CERTIORARI

APPENDIX INDEX

Virginia Code §8.01-257

§8.01-257. Venue generally. -- It is the intent of this chapter that every action shall be commenced and tried in a forum convenient to the parties and witnesses, where justice can be administered without prejudice or delay. Except where specifically provided otherwise, whenever the word "action(s)" is used in this chapter, it shall mean all actions at law, suits in equity, and statutory proceedings, whether in circuit courts or district courts. (1977, c. 617.)

Virginia Code §8.01-265

§8.01-265. Transfer of venue by court. -- In addition to the provisions of §8.01-264 and notwithstanding the provisions of §§8.01-195.4, 8.01-260, 8.01-261 and 8.01-262. The court wherein an action is commenced may, upon motion by any defendant and for good cause shown, transfer the action to any fair and convenient forum having jurisdiction within the Commonwealth, or the court, on motion of a plaintiff and for good cause shown, may retain the action for trial. Except by agreement of all parties, no action . . . . shall be transferred to or retained by a forum not enumerated in such category, nor shall any action brought in a permissible forum pursuant to §8.01-262 be dismissed on the basis that there is a more convenient forum in a jurisdiction other than in the

Commonwealth of Virginia. Good cause shall be deemed to include, but not to be limited to, the agreement of the parties or the avoidance of substantial inconvenience to the parties or the witnesses.

VIRGINIA:
IN THE CIRCUIT COURT FOR THE
CITY OF PORTSMOUTH

WILLIAM L. CALDWELL,

Plaintiff,

V. AT LAW
NO. L-86-127

SEABOARD SYSTEM RAILROAD, INC.,

Defendant.

OBJECTION TO VENUE
AND MOTION TO DISMISS

The defendant, Seaboard System Railroad, Inc., objects to venue in this court and moves to dismiss this action for improper venue, and in support of this motionk comes and says:

1. Chapter 5 of Title 8.01, Code of Virginia, titled "Venue", states: "It is the intent of this chapter that every action shall be commenced and tried in a forum convenient to the parties and witnesses, where justice can be administered without prejudice or delay." Va. Code §8.01-257.

2. This forum is not convenient either to the parties or the witnesses:

(a) The alleged accident occurred in Charlotte, North Carolina, and the cause of action arose in that place;

(b) It is believed that the plaintiff resides in or around Charlotte, North Carolina;

(c) Probably all of the potential liability witnesses reside in or around Charlotte, North Carolina;

(d) The plaintiff received all of his medical care by physicians in Charlotte, North Carolina.

3. Seaboard System Railroad, Inc. is amenable to process of state and federal courts in and for Charlotte, North Carolina, where the cause of action arose.

4. Plaintiff's accident and cause of action did not arise out of any of

the affairs or business activities of the defendant within the City of Portsmouth, and no connection exists between said accident or cause of action and any business of Seaboard System Railroad, Inc. within the jurisdiction of this court.

5. The maintenance of this action in this court would be vexatious and oppressive to the defendant, would offend traditional notions of fair play and substantial justice, and would effectively deny defendant due process and equal protection of law, all in violation of the Constitutions of the United States and the Commonwealth of Virginia.

6. If the statutes of the Commonwealth of Virginia are construed to allow plaintiff to institute and maintain this action in this court, then said statutes as applied would violate

the provisions of the Constitutions of the United States and of this Commonwealth in that they would deny defendant equal protection of laws and due process of law under the Fifth and Fourteenth Amendments of the Constitution of the United States.

7. This court is without jurisdiction of this action against this defendant and no proper venue exists in this court.

WHEREFORE, defendant, Seaboard System Railroad, Inc., moves to dismiss this action since the venue statutes of the Commonwealth of Virginia, if construed to permit this action, would violate the Constitutions of the United States and this Commonwealth.

MOTION TO STAY
FURTHER PROCEEDINGS

The defendant further moves the Court to stay further proceedings in

this action because there is currently pending in the Circuit Court of Jefferson County, Alabama Civil Action No. CV84-6021, which is the same cause of action as alleged herein.

SEABOARD SYSTEM
RAILROAD, INC.

Exhibit A, Attached to
Defendant's Brief in Support
of Objection to Venue and
Motion to Dismiss - Filed
March 28, 1986

EXHIBIT A

The plaintiff, a resident of Charlotte, North Carolina, was a 41 year old switchman on April 4, 1984 when he alleges he suffered a hearing loss while working for the defendant in Charlotte. All known liability and medical witnesses live in and around Charlotte.

Excerpts from Transcript
of Hearing on Defendant's
Objection to Venue and Motion
to Dismiss, held April 2, 1986

THE COURT: But if this was in the federal court, there is no question they would send it down to Florida.

MR. MILLER: Absolutely, one hundred percent, your Honor.

MR. WILSON: We keep saying Florida, but it is North Carolina.

VIRGINIA:
IN THE CIRCUIT COURT FOR THE
CITY OF PORTSMOUTH

WILLIAM L. CALDWELL,

Plaintiff,

V. AT LAW
NO. L-86-127

SEABOARD SYSTEM RAILROAD, INC.,

Defendant.

ORDER

This cause came on upon the defendant's Objection to Venue and Motion to Dismiss and was argued by counsel;

And after consideration of the brief filed by the defendant in support of its motion and the brief filed by the plaintiff, and the arguments of counsel, the Court being of the opinion that the provision of §8.01-265 of the Code of Virginia prohibiting the dismissal of this action on the ground of forum non conveniens violates neither Article I,

Section 11, Article IV, Section 14, Paragraph 18 or Article IV, Section 15 of the Constitution of Virginia;

It is ORDERED that the motion of the defendant to dismiss this action without prejudice is DENIED, to which action of the Court the defendant objects.

And came also the parties on the motion of the defendant to stay the proceedings in this action on the ground that the plaintiff has an identical cause of action against the defendant pending in the Circuit Court of Jefferson County, Alabama or in the alternative to order the plaintiff to take no further action in this cause in Alabama, and was argued by counsel, and the Court being of the opinion that the plaintiff can proceed with each pending action, DENIES the motion, to which

action of the Court the defendant objects.

It is further ORDERED that the defendant shall have fifteen (15) days from the entry of this Order to file its responses to the pleadings served.

IN THE CIRCUIT COURT FOR THE
CITY OF PORTSMOUTH

WILLIAM L. CALDWELL,

Plaintiff,

V. AT LAW
NO. L-86-127

SEABOARD SYSTEM RAILROAD, INC.,

Defendant.

On this the 25th day of November, 1986, came the parties again in person and by their Attorneys and Court convened as of its adjournment of Tues Nov. 24th, 1986, and the jurors sworn to by the issue joined in this case appeared in Court according to their adjournment and after fully hearing all the evidence, the plaintiff, by counsel, again moved the Court to enter Summary Judgment in favor of the plaintiff, for reasons stated in the record, and said motion being heard, the Court doth overrule; and after fully hearing the argument of counsel, the jury retired to

their room to consult of their verdict and after sometime returned into Court having found the following verdict: "We, the jury, find for the plaintiff and assess his damages at $1,500,000.00 signed Jeffrey Neal Joyner, Foreman." 11-25-86, whereupon the defendant, by counsel, moved the Court to set the verdict of the jury aside and to grant it a new trial on the grounds that said verdict is contrary to the law and the evidence, for reasons stated in the record, and the Court doth continue the case generally.

VIRGINIA:
IN THE CIRCUIT COURT FOR THE
CITY OF PORTSMOUTH

WILLIAM L. CALDWELL,

Plaintiff,

V. AT LAW
NO. L-86-127

SEABOARD SYSTEM RAILROAD, INC.,

Defendant.

On this 2nd day of February, 1987, came again the parties by their attorneys and the Court having fully heard the motion of the defendant to set aside the verdict of the jury heretofore rendered herein, and to grant it a new trial on the grounds that said verdict is contrary to the law and the evidence, which motion the Court doth overrule; and said plaintiff is Ordered to remit $500,000.00 of said verdict and plaintiff by letter to this Court has consented to said remitter, judgment is entered on behalf of the plaintiff in

the sum of One Million Dollars ($1,000,000.00) with interest thereon to be computed at the rate of twelve per cent per annum from the 24th day of November, 1986, till paid and costs and this cause is removed from the docket of the Court.

VIRGINIA:
IN THE CIRCUIT COURT FOR THE
CITY OF PORTSMOUTH

WILLIAM L. CALDWELL,

Plaintiff,

V. AT LAW
NO. L-86-127

SEABOARD SYSTEM RAILROAD, INC.,

Defendant.

On this 2nd day of February, 1987, came again the parties by their Attorneys and the Court having fully heard the motion of the defendant to set aside the verdict of the jury heretofore ordered herein, and to grant it a new trial on the grounds that said verdict is contrary to the law and the evidence, which motion the Court doth overrule; and said plaintiff is Ordered to remit $500,000.00 of said verdict and plaintiff by letter to this Court has consented to said remitter, judgment is entered on behalf of the plaintiff in

the sum of One Million Dollars ($1,000,000.00) with interest thereon to be computed at the rate of twelve per cent per annum from the 24th day of November, 1986, till paid and costs and this cause is removed from the docket of this Court.

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IN THE SUPREME COURT OF VIRGINIA

Seaboard System Railroad, Inc.,

Appellant,

against Record No. 870490

Circuit Court No.

L-86-127

William L. Caldwell,

Appellee.

From the Circuit Court of the City of Portsmouth

Upon the petition of Seaboard System Railroad, Inc. an appeal is awarded it from a judgment rendered by the Circuit Court of the City of Portsmouth on the 9th day of February, 1987 in a certain motion for judgment then therein depending, wherein William L. Caldwell was plaintiff and the petitioner was defendant.

And it appearing that and appeal bond in the penalty of $1,000,000, has

heretofore been given, no additional bond is required.

This appeal, however, is limited to the consideration of assignment of error No. 1 which reads as follows:

1. The trial court erred in denying Seaboard's motion to dismiss because of the unconstitutionality of Code §8.01-265.

On further consideration whereof, it is ordered that the parts of the record to be printed or reproduced in the appendix are to be limited to those parts of the record germane to assignment of error No. 1, and the briefs to be filed shall be limited to such discussion as is relevant to the assignment of error upon which this appeal is awarded.

The petition for appeal is refused as to the remaining assignments of error.

PRESENT: ALL THE JUSTICES

OPINION BY JUSTICE WHITING

June 9, 1989

Record No. 870481

WILLIAM L. CALDWELL

V.

SEABOARD SYSTEM RAILROAD, INC.

FROM THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

Lester E. Schlitz, Judge

Record No. 870490

SEABOARD SYSTEM RAILROAD, INC.

V.

WILLIAM L. CALDWELL

FROM THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

Lester E. Schlitz, Judge

In one of these two appeals (Record No. 870490), we decide the constitutionality of that part of the forum non conveniens statute, Code

§8.01-265, which precludes dismissal of actions arising in jurisdictions other than Virginia[1/]. In the other appeal (Record No. 870481), should we hold that provision constitutional, we determine whether the trial court erred in requiring the plaintiff to remit $500,000 of a $1,500,000 verdict awarded him.

On April 4, 1984, William L. Caldwell, a North Carolina resident and employee of Seaboard System Railroad, Inc. (Seaboard), was alighting from a Seaboard locomotive to throw a switch in

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[1/]Code §8.01-265 provides in pertinent part that: the court wherein an action is commended may, upon motion by any defendant and for good cause shown, transfer the action to any fair and convenient forum having jurisdiction within the Commonwealth . . . [but no] action brought in a permissible forum pursuant to §8.01-262 [shall] be dismissed on the basis that there is a more convenient forum in a jurisdiction other than in the Commonwealth of Virginia.

its Charlotte, North Carolina, rail yard when the locomotive's horn was sounded near his ear, causing a hearing loss and other disabilities. On February 12, 1986, Caldwell filed this personal injury action against Seaboard in the court below pursuant to the Federal Employers' Liability Act. 45 U.S.C. §§51-60 (1982),

Because Seaboard regularly and systematically conducted business activity in the City of Portsmouth, Portsmouth was a permissible venue under Code §8.01-262. Seaboard filed an objection to venue and a motion to dismiss, contending that: (1) the Circuit Court of the City of Portsmouth was not a convenient forum; and (2) the appropriate court in Charlotte, North Carolina, where the cause of action arose, would be a more convenient forum. The trial court denied the motion,

citing Code §8.01-265. Thereafter, the case was tried to a jury, which returned a $1,500,000 verdict for Caldwell. The trial court required Caldwell to remit $500,000 of the verdict, or submit to a new trial. Caldwell accepted the remittitur under protest and appealed. Seaboard appealed the order denying its motion to dismiss. We granted both appeals, and we will dispose of the constitutional challenge first.

Denial of Motion to Dismiss (Record No. 870490)

Seaboard concedes that the Commonwealth is not constitutionally required to give any defendant the right to seek to have a case transferred to a more convenient forum,[2/] but argues that

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[2/]This doctrine, known as forum non conveniens, originated in eighteenth century Scotland. W. Gloag and R. Henderson, Introduction to the Law of

Footnote continued on next page.

if the legislature adopts a statute giving such a right to defendants sued on Virginia causes of action, it must extend that right to defendants sued on causes of action arising outside Virginia. Specifically, Seaboard maintains that the part of Code §8.01-265 which prevents trial courts from dismissing any out-of-state actions on the grounds of forum non conveniens, violates several provisions of the Virginia and United States

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Footnote continued from previous page.

Scotland 22 (3d ed. 1939). It permitted a court, in its sound discretion, to decline to exercise its jurisdiction even though the plaintiff brought his action in a proper jurisdiction and venue. It did not contemplate a transfer of the case to another forum, but rather its dismissal. It is applied where a more appropriate forum is available, and the defense is so handicapped by the difficulties and cost of trying the case in a forum as to make a trial unfair to the defendant or burdensome to the public interest. See Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507-09 (1947).

Constitutions. Seaboard's primary contention is that there is no rational basis for applying forum non conveniens to causes of action arising in Virginia, but not those arising outside the Commonwealth.

[1] We consider Seaboard's constitutional attack against the background of our previous decisions. Every statute "carries a strong presumption of validity," and unless it "clearly violates a provision of the United States or Virginia Constitutions, we will not invalidate it." City Council v. Newsome, 226 Va. 518, 523, 311 S.E.2d 761, 764 (1984).

> [T]he party assailing the legislation has the burden of proviing that it is unconstitutional, and if a reasonable doubt exists as to a statute's constitutionality, the doubt must be resolved in favor of its validity. Indeed, because '[a] judgment as to the wisdom and propriety of a statute is within the legislative prerogative,'

> courts will declare legislation invalid only when it is 'plainly repugnant to some provision of the state or federal constititon.'

Etheridge v. Medical Center Hospitals, 237 Va. 87, 94, 376 S.Ed.2d 525, 528 (1989)(citations omitted).

[2-3] "The necessity for and the reasonableness of [a] classification are primarily questions for the legislature . . . . The presumption is that the classification is reasonable and appropriate and that the act is constitutional unless illegality appears on its face." Mandell v. Haddon, 202 Va. 979, 989, 121 S.E.2d 516, 524 (1961). Because this statute does not affect fundamental rights, it is not subject to strict scrutiny to determine if it is necessary to promote a compelling or overriding governmental interest; instead, we review it to see that it is neither arbitrary nor

discriminatory, and that it bears a reasonable relation to a proper purpose. Etheridge, 237 Va. at 97, 376 S.E.2d at 530.

With those principles in mind, we consider the statute and its purposes.[3/] Are there rational reasons for different treatment of causes of action arising within the state and those arising elsewhere? We believe there are at least two such reasons, either of which would supply a rational basis for a different treatment.

[4] First, there is a significant distinction between the transfer of an action and its dismissal. Dismissal

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[3/] Because the statute is unambiguous, we do not consider its legislative history, Peery v. Board of Funeral Directors, 203 Va. 161, 165, 123 S.E.2d 94, 97 (1961), nor will we consider the motives of any particular legislator, as suggested by Seaboard, Blankenship v. City of Richmond, 188 Va. 97, 105, 49 S.E.2d 321, 324 (1948).

involves a risk that a plaintiff may not be able to assert his right of action in another court because of the bar of the statute of limitations or some other reason. There is no such risk in the transfer of cases within the state. Seaboard suggests several ways to minimize those rights. But these arguments are more appropriately addressed to the legislature. See Heublein, Inc. v. Alcoholic Beverage Control Dept., 237 Va. 192, 201, 376 S.E.2d 77, 81 (1989).

[5] Second, in the adoption of Code §§8.01-328 to - 330, the legislature evinced a policy of extending the jurisdiction of its courts to the maximum extent permitted by the Due Process Clause of the United States Constitution. Kolbe, Inc. v. Chromodern, Inc., 211 Va. 736, 740, 180 S.E.2d 664, 667 (1971). The use of

forum non conveniens to deny the access to Virginia courts provided by those statutes reduces the jurisdiction of Virginia courts and, therefore, affects that policy. The reconciliation of these competing policies is a matter of legislative discretion.[4/] Wood v. Board of Supervisors of Halifax Cty., 236 Va. 104, 115, 372 S.E.2d 611, 618 (1988).

[6] Finding a rational basis for the statute, we conclude that it violates neither the Fourteenth Amendment Equal Protection Clause, see Reed v. Reed, 404 U.S. 71, 76 (1971), nor the Fourteenth Amendment Due Process Clause, Williamson v. Lee Optical, 348 U.S. 483, 487-88 (1955); Etheridge, 237 Va. at 97, 376 S.E.2d at 530. For the same reason, we find no violation of the

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[4/]For the same reason, we find no merit in Seaboard's argument that retention of actions arising outside Virginia unduly burdens the Virginia courts.

Due Process Clause of the Constitution of Virginia, Article I, §11, Etheridge, 237 Va. at 97, 376 S.E.2d at 530, or its prohibition against special or private laws, Article IV, §§14 and 15, see Peery v. Board of Funeral Directors, 203 Va. 161, 166-67, 123 S.E.2d 94, 98 (1961).

[7] We need not consider Seaboard's contention that its rights under the Fourteenth Amendment Privileges and Immunities Clause have been violated. Corporations have no rights under that clause. Asbury Hospital v. Cass County, 326 U.S. 207, 210-11 (1945).

[8] Next, Seaboard contends that the statute impermissibly burdens interstate commerce. Again, we review general principles before considering the specific issue.

> [I]n the absence of conflicting legislation by Congress, there is a residuum of power in the state to make

> laws governing matters of local concern which nevertheless in some measure affect interstate commerce . . . . When the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation . . . . such regulation has been generally held to be within state authority.

Southern Pacific Co. v. Arizona, 325 U.S. 761, 767 (1945)(citations omitted).

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)(citation omitted).

State statutes which "burden interstate transactions only incidentally . . . . violate the Commerce Clause only if the burdens they impose on interstate trade are 'clearly excessive in relation to putative local benefits.'" Maine v. Taylor, 477 U.S. 131, 138 (1986). Neither party cites a case in which Commerce Clause considerations were discussed in relation to choice of a forum for litigation.

[9] In our opinion, the attenuating effects, if any, upon interstate commerce inherent in the application of this statute are slight, and are clearly overborne by a legitimate state interest in providing maximum access to its courts. Thus, we find no merit in the argument that interstate commerce is impermissibly burdened by the statute.

For the foregoing reasons, we will affirm the action of the trial court in denying the motion to dismiss.

Requirement of Remittitur

(Record No. 870481)

[10] Because we have sustained the trial court's action in denying the motion to dismiss, we decide whether it abused its discretion in requiring Caldwell to remit $500,000 of the $1,500,000 verdict. Code §8.01-383.1 "tacitly recognized and implicitly ratified" the common law power of a trial court to exercise its sound discretion in requiring remittitur in a proper case. Bassett Furniture v. McReynolds, 216 Va. 897, 910, 224 S.E.2d 323, 331 (1976). Indeed, it is the trial court's duty to require remittitur where appropriate. Edmiston v. Kupsenel, 205 Va. 198, 202, 135 S.E.2d 777, 780 (1964). The issue here is

whether the trial court has properly done so and given sufficient supporting reasons.

Caldwell has recovered a jury verdict. Therefore, in accord with familiar appellate principles, we view the facts in the light most favorable to him.

Caldwell testified that, just after the horn was sounded, he felt lightheaded and dizzy and, later, his ears started ringing and popping, and he had a bad headache. The train master took him to a clinic in Charlotte where Doctor Beard gave him a pain reliever, told him to stay away from loud noises until the ringing and popping stopped, and referred him to Doctor Coconus, described by Caldwell as an "ear doctor." Although Caldwell saw Dr. Coconus twice in a three-month period following his injury, he has been

treated since by a Charlotte otolaryngologist of his choice.

Caldwell complains that his ears wake him at night. He testified that "they pop on me." "They still give me headaches [and] make me lightheaded at times." He cannot stay in a room or place with many people. Because the service at his church becomes "really loud at times," he has to attend his wife's church instead. At home he has problems with his family because: (1) in order to hear the television, he must increase its volume to a level too high for other members of the family; and (2) he does not answer the telephone in the next room because he cannot hear it. Because he gets lightheaded at times, he has difficulty in taking steps. Furthermore, Caldwell says that he has not been allowed to return to work at

Seaboard because of his hearing difficulties.

Expert witnesses indicated that the horn blast was at a noise level substantially in excess of maximum noise levels an ear can tolerate without injury to hearing and balance. This resulted in a permanent hearing loss in high frequency ranges of 22 1/2 percent in Caldwell's right ear and 7 1/2 percent in his left ear, and significantly reduced his ability to understand what is being said in the presence of the background noise associated with a church or social function. This loss will increase in the normal aging process, and further exposure to excessive noise will cause more damage to Caldwell's hearing.

An expert also testified that when Caldwell is quiet, in reading or trying to sleep, he has tinnitus, or a constant

ringing in his ears. The hearing loss also causes recruitment, which is an abnormal increase in loudness or adverse reaction to loud sounds. Thus, when sounds are made loud enough for Caldwell to hear, they seem too loud to him, and will also be distorted. His sense of balance has also been affected. Caldwell's disabilities render him unemployable by Seaboard.

Caldwell will have to be fitted with a hearing aid in each ear, at a cost of $500 to $700 each, and undergo annual audiological examinations at a cost of $40 to $60 each. In the last full year Caldwell worked, he earned $28,481.74, and was entitled to fringe benefits of $9,670.80 per year. He lost $37,687 in wages up to the date of trial.

Before the trial court ruled, it indicated that it considered: (1) the

highest estimated percentage of Caldwell's hearing loss in the high frequency ranges, and his consequent disqualification from railroad work; (2) the estimate of an overall hearing disability of slightly less than two percent; (3) the fact that he could no longer work around loud noises; (4) evidence of tinnitus and of popping in Caldwell's ears; (5) the fact that Caldwell appeared to have no difficulty in hearing while he was testifying; and (6) its review of reported cases involving remittitur of verdicts awarding damages for hearing losses. Recognizing: (1) the difficulty in fixing damages for pain and suffering; (2) the fact that it is "basically a jury question"; (3) that it is "fundamental" that a court should not impose its judgment unless the verdict "is just so outrageous as to shock the

conscience of the court"; but also (4) its duty to set aside a verdict or impose a remittitur upon the plaintiff in an appropriate case, the trial court concluded that remittitur was required in this case.

[11] In sustaining a trial court's remittal order in Bassett Furniture, 216 Va. at 912, 224 S.E.2d at 332 (quoting Hoffman v. Shartle, 113 Va. 262, 264, 74 S.E. 171, 172 (1912)), we said that "the record must show the grounds relied on in support of such action, otherwise it cannot be upheld." Although Caldwell argues that Bassett Furniture requires a trial court to go down "a laundry list" of the grounds assigned by the Bassett Furniture trial court to support its order of remittal, we have not made those grounds talismanic. The trial court's conclusion that the damages are excessive does not have to be supported

by express statements that the damages are so excessive as to shock the conscience, or that the size of the verdict created an impression that the jury had been influenced by passion or prejudice, or that the jury had misconceived or misinterpreted the facts or the law, if one or more of those factors may be fairly inferred from the reasons given for its action.

[12] In our opinion, the reasons the trial court assigned for remittitur sufficiently indicate its grounds and demonstrate that it "considered factors in evidence relevant to a reasoned evaluation of the damages incurred and to be incurred [and its order] will not be disturbed on appeal if the recovery after remittitur bears a reasonable relation to the damages disclosed by the evidence." Id. at 912, 224 S.E.2d at 332.

Caldwell argues that no such reasonable relation exists here. In our opinion, however, the jury could not have concluded that Caldwell had an economic loss greater than $291,427.59. It was comprised of: (1) $37,687.79 wages lost up to the date of trial; (2) the loss of an expected annual $9,670.80 in fringe benefits, for the balance of the 26 years he could have worked for the railroad until his mandatory retirement at age 70, for a total of $251,440.80 (not discounted to present value); and (3) what the parties apparently agreed were projected medical expenses of about $2,300. Therefore, the balance, exceeding $1,200,000, must have been for pain, suffering, and partial disability.

Even though Caldwell did not prove what his future wage losses would have

been,[5/] he argues that the evidence of future economic losses, pain, suffering, and disability clearly justify an award for those elements of over $1,200,000, and, thus, make the trial court's reduction of the award manifestly unreasonable. We do not agree.

Caldwell's injury and disability have affected him, but the evidence does not indicate a substantial amount of pain, suffering, or embarrassment arising out of the hearing loss. Recognizing that Caldwell's employment and social activities will be somewhat limited by his hearing and balance impediments, the evidence does not indicate that he will not be able to find another job, or participate in most

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[5/] Because Caldwell was only partially disabled, the trial court held that such proof was inadmissible in the absence of evidence showing what he might have made in other employment. Caldwell assigned no error to this ruling.

family and social activities not involving loud noises or requiring the ability to hear normally. Therefore, we cannot say the trial court's reduction of the jury's award was unreasonable. Accordingly, we will affirm its order of remittitur.

Record No. 870481 - Affirmed.

Record No. 870490 - Affirmed.

Justice Russell, with whom Justice Compton and Justice Thomas join, dissenting.

The records of this Court indicate that FELA plaintiffs have found a happy hunting ground in Portsmouth. Attorneys representing railroad employees claiming job-related injuries occurring all over the continental United States apparently think it worthwhile to bring actions against railroads in Portsmouth, or in neighboring Norfolk, rather than in the

localities in which the accident occurred.* One may only speculate as to the reasons for this phenomenon.

The cases are numerous and constitute a substantial part of the local judicial workload. The amounts in controversy are large, generating frequent appeals. Our hospitality to this nationwide litigation imposes a significant burden upon Virginia taxpayers.

*A fair example of such a case, having no relation to Virginia, was Stephen R. Thomas v. Seaboard System Railroad, Inc., Record No. 870300, in which we denied an appeal in January 1988. There, the plaintiff was a brakeman riding in a caboose travelling from Danville, Illinois to Evansville, Indiana. Alleging that he had slipped on a wet floor in the caboose, he

brought suit against the railroad in Portsmouth, Virginia, claiming $3,000,000.00 in damages.

The record in the present case indicates that of 201 FELA cases filed in Portsmouth during the years of 1981-1986, 141 cases alleged accidents which occurred outside Virginia.

Against that background, the railroads contend that they are disadvantaged by being required to transport their witnesses and records across the country in order to stand trial on a battleground of their opponents' choosing, where they perceive temselves to be regarded as "target" defendants. Under the statute complained of here, they may not invoke the protection of forum non conveniens and under the FELA they cannot remove the case to a federal court. The plaintiff has absolute control of the

venue and suffers no compensating disadvantage. We have often said that the parties to a lawsuit are entitled to a level playing field, but the decision handed down today marks a significant departure from that just rule.

This state of affairs may lead to results as absurd as they are unfair. In a hypothetical case, a trainman suffers injury on a westbound train passing through Bristol, Virginia. If he seeks to recover for his injuries in Portsmouth, the defendant railroad may, for good cause shown, obtain a transfer of the case to Bristol, where the cause of action arose, pursuant to Code §8.01-265. On the other hand, if the accident occurs a few seconds later, when the train has crossed into Bristol, Tennessee, the plaintiff may force the railroad to defend itself in Portsmouth, Virginia. Thus, the defendant might

have a strong incentive to contend that the accident occurred in Virginia, and the plaintiff to contend that it occurred in Tennessee.

There is, in my view, no conceivable rational basis for the statute under consideration. It makes a distinction between causes of action arising within and without the state which arbitrarily discriminates against FELA defendants and serves no valid state interest.

It is unnecessary to look to foreign authority for the origins of forum non conveniens. That doctrine has been codified by statute in Virginia, in strong language. Code §8.01-257, which the majority opinion fails to mention, provides, in pertinent part: "[E]very action shall be commenced and tried in a forum convenient to the parties and witnesses, where justice can be

administered without prejudice or delay." The non-dismissal clause under review here accords the benefit of that clear declaration of legislative policy to FELA plaintiffs, wherever their causes of action arises in Virginia, but denies it to FELA defendants where the cause of action arises outside the state.

The majority opinion labors diligently to suggest a rational basis which might justify this obvious discrimination. It suggests two possible justifications. The first suggested justification is that the state might have some concern that a plaintiff whose case is dismissed here might have nowhere else to go, "because of the bar of the statute of limitations or other reason." There are several answers to that concern. Forum non conveniens is discretionary. The court

need not dismiss the plaintiff's case unless the plaintiff actually has an available forum, convenient to both parties, in which his case may be tried. If the court is in doubt, it need not immediately dismiss the case, but may grant a stay until the availability of the more convenient forum can be tested. Finally, the majority's concern about the statute of limitations is singularly unpersuasive. That situation would arise only where the plaintiff not only sought to disadvantage the defendant by bringing his action in an inconvenient forum, but compounded his unfair tactics by waiting until the latest possible time in which to do so.

The second "rational reason" given by the majority opinion to support the non-dismissal clause is that by adopting the long-arm statute, Virginia sought to extend its jurisdiction to the maximum

limits permitted by the Due Process Clause, and that dismissals under forum non conveniens would contravene that policy. That reasoning is flawed in three respects. First, the General Assembly, by codifying forum non conveniens in the sweeping language of Code §8.01-257, adopted that doctrine as legislative policy just as clearly as its extension of long-arm jusisdiction. The two policies coexist, and it is our duty to harmonize them, not to submerge one to serve the other. Second, forum non conveniens has no impact whatever on the court's jurisdiction. The doctrine concedes that the court has jurisdiction, but justifies a refusal to exercise it where to do so would be unfair to the defendant or burdensome to the public. See Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507-09 (1947). Finally, the extension of jurisdiction

represented by the long-arm statutes is completely irrelevant to the present case. The defendant railroad does business in Virginia and has a statutory agent for the service of process. No long-arm proceedings are involved. We are discussing venue, not jurisdiction.

Because the discrimination and unfairness resulting from the non-dismissal clause of Code §8.01-265 is obvious and egregious, and because I can perceive no rational justification for it, I would hold it unconstitutional as applied, in violation of the Equal Protection Clause, U.S. Const. amend XIV, §1.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 22nd day of September, 1989.

Seaboard System Railroad, Inc.,

Appellant,

against Record No. 870490

Circuit Court No.

L-86-127

William L. Caldwell,

Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 9th day of June, 1989 and grant a rehearing thereof, the prayer of the said petition is denied.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 23rd day of October, 1989.

Seaboard System Railroad, Inc.,

Appellant,

against Record No. 870490

Circuit Court No.

L-86-127

William L. Caldwell,

Appellee.

ORDER DEFERRING ISSUANCE OF MANDATE

Upon consideration of the motion of the appellant, by counsel, it is ordered that issuance of the mandate herein be and the same hereby is deferred, to and including the 21st day of December, 1989, on the expiration of which time the same may be issued, unless the case has been before that time docketed in the Supreme Court of the United States, in which event issuance thereof shall be

deferred until the final determination of the case by that Court.

PORTSMOUTH CIRCUIT COURT

ALL RAILROADS EXCEPT NORFOLK & PORTSMOUTH BELT LINE

CASES FILED PER YEAR:

1981	7	
1982	6	
1983	18	
1984	18	
1985	61	
1986	98	
1987	160	
1988	185	
1989	190	(through 12/4/89)
	743	

ALLEGED LOCATION OF ACCIDENT:

Portsmouth	16
Virginia, not Portsmouth	227
Out of Virginia	488
	731

Some locations not pled.

PORTSMOUTH CIRCUIT COURT

CHESAPEAKE & OHIO RAILWAY COMPANY

CASES FILED PER YEAR:

1981	2	
1982	0	
1983	7	
1984	8	
1985	29	
1986	36	
1987	36	
1988	1	
1989	0	(through 12/4/89)
	119	

ALLEGED LOCATION OF ACCIDENT: (1981 through 12/4/89)

Kentucky	17
Maryland	2
Michigan	1
North Carolina	1
Ohio	3
Virginia, not Portsmouth	50
West Virginia	26
Locations not pled	18
	118

PORTSMOUTH CIRCUIT COURT

CSX TRANSPORTATION, INC.

CASES FILED PER YEAR:

1986	22	
1987	51	
1988	112	
1989	130	(through 12/4/89)
	315	

ALLEGED LOCATION OF ACCIDENT: (Through 12/4/89)

Alabama	7
Florida	2
Georgia	16
Illinois	5
Indiana	2
Kentucky	33
Maryland	5
Michigan	3
North Carolina	69
Ohio	14
Pennsylvania	1
South Carolina	11
Tennessee	11
Virginia, Portsmouth	10
Virginia, not Portsmouth	51
West Virginia	34
Location, not pled	40
	314

PORTSMOUTH CIRCUIT COURT

NORFOLK AND WESTERN RAILWAY COMPANY

CASES FILED PER YEAR:

1981	3	
1982	0	
1983	2	
1984	0	
1985	4	
1986	10	
1987	71	
1988	68	
1989	53	(through 12/4/89)
	211	

ALLEGED LOCATION OF ACCIDENT:

Kentucky	1
North Carolina	4
Ohio	7
Virginia, Portsmouth	6
Virginia, not Portsmouth	109
West Virginia	13
Garnishments	3
Transferred to other Virginia Jurisdictions	3
Location not pled	65
	211

PORTSMOUTH CIRCUIT COURT

SEABOARD SYSTEM RAILROAD, INC.

CASES FILED PER YEAR:

1981	2	
1982	6	
1983	9	
1984	10	
1985	28	
1986	30	
1987	1	
1988	0	
1989	0	(through 12/4/89)
	86	

ALLEGED LOCATION OF ACCIDENT:

Alabama	1
Florida	4
Georgia	13
Indiana	3
Kentucky	2
North Carolina	34
South Carolina	6
Tennessee	6
Virginia, Portsmouth	2
Virginia, not Portsmouth	9
Transferred to other Virginia Jurisdictions	2
File in Supreme Court	1
Location not pled	3
	86

PORTSMOUTH CIRCUIT COURT

SOUTHERN RAILWAY

CASES FILED PER YEAR:

1987	1
1988	3
1989	4
	8

ALLEGED LOCATION OF ACCIDENT:

Georgia	1
South Carolina	3
Tennessee	1
Virginia, not Portsmouth	2
Transferred	1
	8

Trial Testimony

William L. Caldwell

Q. Mr. Caldwell, where do you live?

A. 1507 Vancouver Drive, Charlotte, North Carolina.

***

Q. You say you're a conductor/switchman. What railroad did you work for?

A. Seaboard Coastline Railroads.

Q. And how long have you worked with that railroad, Mr. Caldwell?

A. Nineteen and-a-half years.

***

A. Yes, I was taken to Nile Clinic.

Q. And where is that located?

A. In Charlotte, North Carolina.

Q. And what happened at Nile Clinic?

A. I saw the company doctor, Dr. Beard.

***

Trial Testimony

Marvin R. Deese

A. Marvin Reid Deese.

Q. Where do you reside?

A. Pardon?

Q. Where do you reside?

A. Charlotte, North Carolina.

Q. And what's your occupation?

A. Yard conductor.

***

Trial testimony

William M. Mauney

Q. Mr. Mooney, would you state your name, please.

A. William Murphy Mooney.

Q. And your address.

A. Charlotte, North Carolina, 1924 Bennett Place.

Q. and how long have you resided there?

A. About 16 years.

***

Q. And were you operating a yard engine on April 4, 1984?

A. I was operating a yard engine yes, sir.

***

Trial Testimony

De Bene Esse Deposition

Trevor I. Goldberg

A. My name is Trevor Ian Goldberg. My office is at 1600 East Third Street in Charlotte 28204.

Q. What is your profession?

A. I'm a medical physician and I am a specialist in otolaryngology.

Pursuant to Rule 28.1, petitioner submits the following Statement of Corporate Affiliations:

Seaboard System Railroad, Inc., was renamed CSX Transportation, Inc. on July 1, 1986 and the surviving corporation under the name of CSX Transportation, Inc. succeeded to the ownership of the property of Seaboard System Railroad, Inc. CSX Transportation, Inc. is a wholly owned subsidiary of CSX Corporation and has the following subsidiaries (except wholly - owned): Alleghany and Western Railroad Co., Augusta and Summerville Railroad Co., Beaver Street Tower Co.,

Chatham Terminal Co., Colearfield and Mahoning Railway Co., Dayton and Michigan Railroad Co., Dayton and Union Railroad Co., Fruit Growers Express Co., The Home Avenue Railroad Co., North Charleston Terminal Co., Paducah &

Illinois Railroad Co., The Baltimore and Cumberland Valley Railroad Extension Co., Winston-Salem Southbound Railway Co., Woodstock & Blocton Railway Co., Richmond - Washington Co. and Richmond, Fredericksburg and Potomac Railroad Co.

STATEMENT OF THE CASE

Petitioner, Seaboard System Railroad, Inc., is incorporated in the Commonwealth of Virginia. It operates substantial rail lines, yards, and terminals there. (Trans. of Apr. 2, 1986, at 24.) This action was brought in the Circuit Court for the City of Portsmouth, where petitioner does business and where venue was properly laid under Virginia law. Before trial, petitioner moved to dismiss for forum non conveniens because the case arose from a railroad accident in Charlotte, North Carolina, and because Virginia Code section 8.01-265, which allows transfers but not dismissals for forum non conveniens, was unconstitutional. The circuit court denied the motion.

At trial, petitioner presented evidence from a single eyewitness to the accident